EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Protect Our Parks, Inc., Charlotte Adelman, Maria Valencia, and Jeremiah Jurevis,	)	
Plaintiffs,	)	Case No. 18-cv-3424
v.	)	Honorable John Robert Blakey
Chicago Park District and City of Chicago,	)	
Defendants.	)	

BRIEF OF PROFESSOR RICHARD EPSTEIN AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS OR FOR JUDGMENT ON THE PLEADINGS

Michael Rachlis (ARDC No. 6203745)
Rachlis Duff Peel & Kaplan, LLC
542 S. Dearborn St., Suite 900
Chicago, IL 60605
(312) 733-3955
mrachlis@rdaplaw.net

Attorney for Amicus Curiae

Interest and Identity of *Amicus*

This *amicus curiae* brief is submitted by Professor Richard A. Epstein, a well known and highly regarded scholar, who for decades has taught and written extensively on trust and property issues, including the public trust doctrine, and as such is deeply interested in the development and application of public trust principles. As reflected in the short biography set forth in the Appendix, Professor Epstein (referred to hereafter as "*Amicus*" or "Professor Epstein") is currently on the faculty at both the University of Chicago Law School and New York University Law School.

Amicus submits this brief in response to the *amici curiae* submission (the "Brief") by certain law professors (the "Group").[1] The Group claims that the Obama Presidential Center ("OPC") "produces an overlapping consensus among property law scholars: the OPC is consistent with the public trust doctrine and is an appropriate use of the Jackson Park site under any manner of applying the doctrine." (Brief at 7.) *Amicus*, a pre-eminent property law scholar, takes a different view of the matter, and offers an alternative understanding of the history and structure of the public trust doctrine, which makes it clear that the proposed transfer of property that comprises the OPC not only represents bad public policy, but also is in clear violation of the public trust doctrine.

The gist of the disagreement in this case and between the Group *and Amicus* goes to the level of scrutiny that the courts should apply to any transfer of public lands by the City of Chicago ("City") to a private group, the Obama Foundation, for its private purposes. The Group insists (as do the Defendants) a low rational basis standard applies to this case, so the City discharges its fiduciary duties to the public at large so long as it can think of some benefit that might run to the

[1] *Amicus* states that he co-authored this brief with undersigned counsel. No party or party's counsel authored the brief in whole or in part, and that no party or party's counsel contributed money that was intended to fund preparing or submitting the brief.

public from the transfer of property in question, followed by the inaccurate conclusion that "[c]onstructing the Obama Presidential Center . . . furthers the kinds of core uses contemplated by the public trust doctrine." To the contrary, *Amicus* believes that the fiduciary duties in this case impose a far more exacting standard on the City, given the huge conflict of interest that arises from the close and enduring connections that former President has with key City officials. That standard requires that one look not just to the benefits claimed for the OPC, but also at the massive dislocations and high costs of putting the project in this location. *Amicus* does not take the position that it is impossible under any circumstances for the City and its Park District to strike a deal for the construction of the OPC utilizing some public lands, but that as located and documented, the proposed OPC fails under the public trust doctrine.

Relevant Background

Plaintiffs' lawsuit challenges the proposed construction of the Obama Presidential Center on some 19.3 acres in Jackson Park—one of the monumental creations by the renowned landscape architect, Frederick Law Olmsted—on the south side of Chicago. The proposed site will have at its epicenter a massive tower that could reach 235 feet, located near East 60th Street, close to, and clashing with, nearby lakefront fixtures including both the Museum of Science and Industry as well as the University of Chicago. The scale of the major and auxiliary buildings requires closing a six-lane north-south artery, Cornell Avenue, which roadways are not only important historic vistas to Jackson Park, but a major north-south route near Lake Michigan. In order to cope with the disruption of traffic, the cash-strapped City will have to spend untold millions to make major alterations to expand two nearby arteries, Lake Shore Drive on the east and Stony Island Avenue on the west. Additional parking facilities will have to be built somewhere inside the park. An initial OPC proposal to build a massive structure above ground was withdrawn after it was met

with a chorus of boos. But Chicago's high water table makes it an expensive (and problematic) proposition to build a substitute facility below ground. The tight boundaries around the complex will make it difficult to develop complementary businesses in the immediate neighborhood, and are likely to cause displacement inconvenience to current businesses and residences as OPC related activities are likely to take over.

There are, moreover, a number of less historically significant sites on the South Side of Chicago that present none of the planning tangles of the proposed OPC project. While *Amicus* is not endorsing a specific site, it should be noted, for example a combination of private and public land near Washington Park, utilizing larger tracts of largely undeveloped space located just west of Hyde Park, could easily house the OPC, leaving it room to grow. It is also near a major expressway and has space for neighborhood businesses to develop.

These are not obscure concerns. Indeed, they have been a source of tension on the South Side of Chicago. The proposed plans for the Park came into much criticism from University of Chicago faculty and staff.

> The South Side has an abundance of empty spaces. Acres of land owned by the University of Chicago are a few minutes away on the vacant lots west of Washington Park at the corner of Garfield Boulevard and Martin Luther King Drive, and plans already exist for a real presidential library on that site. In that location, the center would have abundant public green space a few steps away and a train line to downtown that would come to its very door. It would sit on the commercial strip of Garfield Boulevard that is prime for economic redevelopment. The Jackson Park location is not near a commercial strip. The economic benefits will mainly take the form of big profits for real estate speculators in nearby Woodlawn and gentrification that will drive out lower-income residents.[2]

These objections to the project were effectively overridden when the Chicago City Council's Committee on Housing and Real Estate gave the project its unanimous blessing on

[2] See Letter, W.J.T. Mitchell, professor University of Chicago: Who will benefit from the Obama Center? January 25, 2018, available at https://www.chicagotribune.com/news/opinion/letters/ct-obama-center-uchicago-jackson-park-20180125-story.html

October 11, 2018. By that time, however, the action had started to shift to the courts: On May 14, 2018 a long-time activist group, Protect Our Parks, joined by several Chicago residents, filed the suit at bar, challenging the construction of the OPC under the public trust doctrine. The suit seeks to invalidate the transfer of property rights in the Jackson Park land from the Park District to the City for the nominal price of $1, after which the City plans to designate it for use by the Obama Foundation, all without a formal transfer of title.

At no point did anyone offer a reasoned defense of the choice of location for the OPC that systematically addressed the forceful objections against it. It is fair to say that the City and Park District failed on two counts. First, they failed to undertake the due diligence of trustees to see that the project made sense. Second, they never established that the project, which is rife with conflicts of interest, supplies a fair value in exchange to the City.

Even this brief description offers conclusive evidence of the one-sided nature of this transaction. Nonetheless, the Group's amicus submission takes the position that none of this evidence matters and that this Court should simply defer to the judgment of the City and Park District, no matter how powerful the procedural and substantive objections against this project. In their view, the matter is well-settled in favor of that deference. The purpose of this brief is to present the alternative analysis of the case which is consistent with well-established fiduciary principles, as applicable to public and private trustees which underlie public trust jurisprudence.

Summary of Argument

This case is about the fiduciary duties that attach to the management and disposition of all public lands. *Amicus* argues that a uniform set of rules govern the behavior of trustees whether public or private. The fact that land is or was once submerged is a factor to be taken into account in deciding whether the actions of public bodies do or not comport with the public trust doctrine.

In general, when lands are still submerged, alienation is far less likely to make sense from a social or economic point of view, so that the faithful trustee should be highly reluctant to enter into those transactions. But for land that has never been submerged (or which is no longer submerged), the standard duties governing trustee behavior are long-standing. More concretely, the two relevant duties are the business judgment rule and the fair value rule. In those cases, in which there is no conflict of interest, the business judgment rule applies so that if the project is reasonable and in good faith, then it can stand. But where the conflicts of interest are acute, as in this case, the risk of favoritism in the use or disposition of public lands requires that close scrutiny be given to the transaction to avoid the dissipation of public assets through illicit transfers to private parties. Favoritism and intrigue are as out of place for public trustees as they are for private ones. Indeed, what is distinctive about the public trust doctrine in the state of Illinois and elsewhere is that it is often *too* restrictive insofar as it applies to submerged lands, where it prohibits any outright transfer at all, even those which return substantial benefits to the public at large, which make them win/win for both sides. But it is widely agreed that this total prohibition—which would doom the OPC from the outset—does not appear applicable to this transaction. The only relevant issue is the level of scrutiny brought to the deal. In light of the facts in this case, the conflicts of interest are rife so that the proper standard of review is the higher fair value standard, which the purported transfer of use rights to the OPC clearly flunks.

I. Public Trust Jurisprudence Focuses on the Use and Abuse of Fiduciary Obligations of Public Officials Relative to Public Trust Property.

The Group holds that the key element in the analysis is whether the public trust property is located on land that was once-submerged under Lake Michigan land or not: if the public trust property is on currently or previously submerged land, any purported transfer fails on the ground that no alienation of such land is permitted under the public trust doctrine. In contrast, if the project

is not located on lands that were never submerged, (as Defendants argue here as to Jackson Park), then it goes forward almost as a matter of course.

That position is inconsistent with the current state of the law. The seminal case on the public trust doctrine, *Ill. Cent. R. Co. v. Illinois,* 146 U.S. 387 (1892), did result in a total prohibition against any form of transfer. But that rule has never been applied to lands that were never submerged, which includes Jackson Park. Thus, in *Paepcke v. Pub. Bldg. Comm'n of Chicago,* 46 Ill. 2d 330 (1970), the Illinois Supreme Court expanded the public trust doctrine from one designed to preserve navigation, commerce, and fishing (*i.e.*, addressing submerged Lake Michigan land) to one concerned more broadly with any public decision to reallocate public resources "to more restricted uses or to subject public uses to the self-interest of private parties." 46 Ill. 2d at 336-37. The *Paepcke* Court expanded standing to taxpayers to challenge a public project on the grounds that they own fractional interests in that property. *Id.* at 341.

Paepcke clearly stands for the proposition that the public trust doctrine is *not* necessarily tied to whether the property transfer at issue involves submerged Lake Michigan land or not. If the state of law was as the Group suggest, there would have been no need or purpose for the Illinois Supreme Court in *Paepcke* to expand the public trust doctrine beyond that set forth in *Illinois Central*. What sits at the heart of a public trust case is not necessarily the question of whether a property sits on submerged Lake Michigan land, but rather the actions of and influences upon the trustee/fiduciary – legislative and executive officials– in their decision making relative to the use and disposition of such property. This inquiry is the common thread that weaves through public trust cases, and is the mechanism by which the courts are tasked with ensuring that a transfer of public trust property is fair and proper, and not tainted with conflicts, insider favoritism, or self-dealing favoring a private party.

Under the public trust doctrine, the government is prohibited from giving use and control of public property for a private purpose. The legislature and municipal representatives act as trustees with special duties and responsibilities relative to the public (the owners of such property) for the use and/or transfer of public trust property. *See Illinois Central*, 146 U.S. at 453 (state cannot "***abdicate its trust over property in which the whole people are interested***… so as to leave them entirely under the use and control of private parties.") (emphasis supplied). The basic tenants of public trust law boil down to a review of why the fiduciary is transferring the public property and who will be using it: "Three basic principles can be distilled from this body of public trust case law. First, courts should be critical of attempts by the state to surrender valuable public resources to a private entity …. Second, the public trust is violated when the primary purpose of a legislative grant is to benefit a private interest. . . . Finally, any attempt by the state to relinquish its power over a public resource should be invalidated under the doctrine." *Lake Michigan Fed'n v. U.S. Army Corps of Eng'rs*, 742 F. Supp. 441, 445 (N.D. Ill. 1990).

Because of the special obligations that governmental officials have as trustees in guarding public trust properties, courts have imposed a heightened standard of review of the performance of those obligations relative to the disposition of such properties. Such law and policy, discussed in Section II, *infra*, supports the role of the courts in closely scrutinizing a proposed transfer of public trust property.

II. Public Trust Cases Require a Heightened Standard of Review.

The Group's overarching claim is that public trust law mandates that complete deference be provided to the legislative pronouncements, and to the extent that the law differs from that view, such decisions are distinguishable because they involve submerged land or are just wrong. That claim, however, is not based on an accurate reading of the public trust doctrine, nor related

jurisprudence addressing use of public property for private purposes or the evaluation of actions of fiduciaries.

The applicable cases and underlying policies teach that courts apply (or should apply) heightened scrutiny well above the (at best) tepid rational basis type of review advanced by the Group. Such increased scrutiny is consistent with legislative history on the disposition of public property, the common law on public trust issues, as well as related doctrines dealing with eminent domain, as well as the manner in which the law has analyzed such duties and responsibilities in the applying the business judgment rule relative to actions of directors and trustees in private transactions.

With respect to legislative history, during the Sixth Illinois Constitutional Convention held in advance of the adoption of the 1970 Illinois Constitution, when questions arose regarding what might violate the public funds for private purpose clause, it was made clear that the courts had resolved such questions, and would continue to resolve those issues.[3]

Consistent with such pronouncements, public trust case law demands heightened scrutiny because the purpose "of the public trust doctrine is to police the legislature's disposition of public lands." *Lake Michigan Fed'n*, 742 F. Supp. at 446. "If courts were to rubber stamp legislative decisions, ... the doctrine would have no teeth. The legislature would have unfettered discretion to breach the public trust as long as it was able to articulate some gain to the public." *Id.*

Such heightened scrutiny (which provides teeth to the public trust doctrine) is not surprising because it mirrors the type of scrutiny that is applied to eminent domain cases.

[3] Representative Frank Cicero stated: "The question of what is a public or private purpose is ultimately settled by the court. Legislation setting up any particular use of public funds or any particular extension of credit usually states that it is to serve some public purpose, but the ultimate decision on that question is up to the courts and would continue to be so." Record of Proceedings, Sixth Illinois Constitutional Convention, Verbatim Transcripts at page 870.

Thus, while the Takings Clause commands that private property not be taken for public use without just compensation, the public trust doctrine demands that public property should not be given to private use without just compensation. It is understood the two doctrines are complements for each other.

> The public trust doctrine is the mirror image of the eminent domain clause. Both are designed to place limitations on the power of the legislature to divert property, whether held privately or in common, from A to B, or more generally from a group of As to a group of Bs. Both doctrines derive from a strong sense of equity that condemns these uncompensated transfers as a genteel from of theft, regardless of whether the holdings are public or private.

Epstein, *The Public Trust Doctrine,* 7 Cato Journal 411, 426 (Fall 1987).

In a typical eminent domain case, the government is prohibited from taking property from a private party to serve a primarily private purpose. In such cases, a heightened scrutiny is applied to the determination of whether there was in fact a public use associated with the taking. *See, e.g. Sw. Ill. Dev. Auth. v. Nat'l City Envtl., L.L.C.,* 199 Ill.2d 225, 239 (2002). In that case, the Illinois Supreme Court rejected the exact argument advanced here by the Group (and the Defendants), namely that the "wisdom . . . of the legislation and the 'means of executing the project' are beyond judicial scrutiny 'once the public purpose has been established.' . . . We disagree. The Constitution and the essential liberties we are sworn to protect control." *Id.* at 242. Given the number of individuals impacted by the transfer of public trust property, the application of heightened scrutiny is more than appropriate. To that same point, the need to scrutinize transactions that may be tainted with fraud, conflicts, and/or insider favoritism is further reason to have meaningful judicial review, as is done when courts evaluate the conduct of trustees and fiduciaries in private transactions.

Illinois law (like that of other jurisdictions) shields directors and officers who have been diligent and careful in performing their duties from liability for honest errors or mistakes in judgment. *See, e.g., Stamp v. Touche Ross & Co.,* 263 Ill. App. 3d 1010, 1015 (1st Dist. 1993).

The business judgment rule was developed in recognition that "courts are ill equipped to engage in *post hoc* substantive review of business decisions," and "operates to preclude a court from imposing itself unreasonably on the business and affairs of a corporation." *Sharper v. Bryan*, 371 Ill. App. 3d 1079, 1092 (1st Dist. 2007) (discussing Delaware law).

However, where there are allegations of failure of due care, or allegations of bad faith, fraud, illegality, self-dealing, conflicts, or gross overreaching the business judgment rule is not applicable. *See, e.g., Palm v. 2800 Lake Shore Drive Condo. Ass'n*, 2014 IL App (1st) 111290, ¶¶ 108-115 (affirming trial court determination that business judgment rule inapplicable). In such circumstances, the actions of the fiduciary are subject to heightened scrutiny to determine whether he or she became sufficiently informed to make an independent business decision, or have been influenced by self-dealing, fraud, or other conflicts. *See, e.g., Davis v. Dyson*, 387 Ill. App. 3d 676 (1st Dist. 2008) (reversing dismissal of complaint alleging that directors did not have enough information to make decision). Put differently, a rubber stamp by a board or officers of actions by those actively managing a business will not suffice to allow the application of the business judgment rule. *See, e.g., Barr v. Wackman*, 329 N.E.2d 180, 188 (N.Y. 1975).

All of these principles are expressly or impliedly implicated within the public trust doctrine, and provide guidance regarding the concerns and scrutiny properly used by courts in addressing such cases. Decisions where deference was shown generally did not involve situations where there were many, if any, notions of conflicts or improper insider actions or favoritism; put differently, the courts applied some measure of the business judgment rule. For example, in *Paepcke*, there were no implications of a lack of diligence in decision making, insider related favoritism, self-dealing, and/or other conflicts in conjunction with the creation of the development of a school in Washington Park. To the contrary, there are a host of facts that established that there

were no insider related favoritism or conflicts which led to the decision to find that the construction of a public school that used a tiny portion of land in Washington Park (2.6 acres) did not violate the public trust doctrine. If that were not enough, the court found that such use of this property for the construction of a school to be part of the original plans approved by the legislature for Washington Park, and as such, the fiduciary was not taking steps where original park purposes were destroyed or greatly impaired. *Paepcke,* 46 Ill. 2d at 342-43.

Similarly, the decision in *People ex rel. Kirk,* which involved approval of the construction of Lakeshore Drive, appeared to have no issues of fraud or insider dealing. And, as to the *Friends of the Parks* case involving Soldier Field – the stadium itself that was subject to the public trust challenge remained a sports stadium, which is being used by the Bears for a limited amount of days per year.

However, in other cases where there were notions of failures of due care, insider favoritism and the like, the courts applied heightened scrutiny. In *People ex rel. Scott v. Chicago Park Dist.,* 66 Ill. 2d 65 (1977), issues existed as to the due care that was being taken in regards to the sale of public trust land to a private party. No different than the position advanced by the Group (and the Defendants in the litigation), there were arguments about deference that was required given the pronouncements by the legislature. The deference arguments were rejected, with the court noting that when public trust property is involved, "additional employment and economic improvement is too indirect, intangible and elusive to satisfy the requirements," requiring much more detail and support to justify such a transfer. *Scott,* 66 Ill. 2d at 80-81. The Court emphasized that such additional scrutiny was important given other public concerns as "there has developed a strong, though belated, interest in conserving natural resources and in protecting and improving our physical environment. The public has become increasingly concerned with dangers to health and

life from environmental sources and more sensitive to the value and, frequently, the irreplaceability of natural resources." *Id.* at 79. This precise concern is important in the case at bar as well, given the iconic status of Jackson Park.

Similarly, in the Lucas Museum case – which is the most recent decision on such issues and involving a situation that is similar to the one at bar – the district court found that the plaintiffs had alleged sufficient facts to establish a violation of the public trust doctrine. *See Friends of the Parks v. Chicago Park Dist.*, 2015 WL 1188615 (N.D. Ill. March 12, 2015) ("Lucas I), and *Friends of the Parks v. Chicago Park Dist.*, 160 F. Supp. 3d 1060 (N.D. Ill. 2016) ("Lucas II"). In that matter, the Court held that the status of the land as previously submerged militated against its transfer to a private party (a not for profit entity). But as the area of Jackson Park at issue here may not be on submerged land, the key analytical issue in that case relates to the question of whether the City had taken steps to make itself sufficiently informed to make an independent business judgment about the project, and whether the deal in question, which transferred the right to use and control of the property to a private entity for 99 years was sufficiently advantageous to the City.

The Group tries valiantly to distinguish this case, but the clear message is as follows: If there were genuine doubts about the processes of decision and the potential conflicts of interest with the Lucas Museum, then any transfer of exclusive use rights to the OPC is, as we now show, blatantly inconsistent with the public trust doctrine.

III. The Public Trust Doctrine, Related Law and Policy Are Against the OPC.

The Group' conclusory statement that the OPC is a permissible use of Jackson Park (Brief at 13) is the byproduct of their result oriented and faulty analysis.

The Group concedes that the OPC is being constructed on public trust property. That is not debatable under the principles of *Illinois Central* and *Paepcke*.

As discussed *supra*, public trust law, and policy clearly provide special protections, analogous to the protections provided by the United States and Illinois constitutions to private property, insuring that use and control of public property is not given to private parties. Here, a private party – the Obama Foundation – is being provided 19.3 acres of Jackson Park to essentially own and control, and in that process actually work to destroy that land and its uses. The *Paepcke* court understood that the public trust doctrine provided guard rails against "more restricted uses or to subject public uses to the self-interest of private parties." Further, while the Obama Foundation is a not-for-profit and affiliated with the 44th President of the United States, that does not make a difference to the analysis: "Nor should the federal court carve out an exception to the law because the affected private party is a respectable non-profit entity." *Lake Michigan Fed'n*, 742 F. Supp. 2d at 445. Ignoring these salient facts, the Group insists that it is a profound mistake "to reject the legislative determination that the construction of a museum and center focused on the 44th President, and the first African American President of the United States will serve the public interest." No one denies that abstract proposition.

Once that bald declaration is made, the Group avoids addressing the manifest conflicts of interest in the case. Former President Obama is one of the most powerful and influential personages in Chicago life, with deep ties to Mayor Rahm Emanuel and with many close connections to key city public officials. His enormous clout cries out, not for deference, but for searching scrutiny. Yet the Group does not devote one word to the critical question of fair value. The manifold objections on that front start with the obvious point that permanent use of the site is given to the Obama Foundation without any rental payment. Perhaps the added attraction that the

center gives to the City of Chicago could justify such an arrangement. But if so, the point applies with equal force to building it in some other location in the City. The public benefits to the City come from the location of the OPC in Chicago, not from its location in Jackson Park.

The cozy relationship between the Obama Foundation and the City explains why the public trust doctrine is applicable and inconsistent with the OPC. Indeed, analogous to the law regarding the application of the business judgment rule, the transaction at issue is a classic circumstance of an insider favoritism, one where the self-interests of the private party dictates all results and actions of the Mayor (Obama's former Chief of Staff) and the City Council who simply acted to rubber stamp the wishes and desires of that private party. Those wishes include, *inter alia,* the destruction of Jackson Park, the elimination of hundreds of trees, the destruction of the historic Women's Garden, historic roadways closed and the addition of a 235' tower on the Midway which carries with it a 99-year commitment, with the large swath of the rights of ownership being provided to and exercised by the Obama Foundation.[4] Such transactions are viewed with heightened scrutiny under every applicable body of law, which is necessary here.

Essentially ignoring much of these concerns, the Group argues that whether something is a public purpose is for the legislature, not the courts. That position is unsupported. First, as discussed *supra*, there is ample law, whether it be public trust, eminent domain, or cases looking

[4] Moreover, arguments that the property would ultimately revert back to the public ownership if the private party here fails to succeed ignores the huge interim damage that this project will cause. Conceptually, moreover, that bland pronouncement is no different than the empty legislative pronouncements of public benefits that are also to be ignored. It is indeed nonsensical to give up a unique public treasure and allow it to be destroyed, controlled, and used, and somehow justify it by saying if the project fails, whatever its tattered and scarred remains will revert back to the public. Whatever may be returned later does not diminish the lack of control and use, and the destruction that is caused through those efforts irrevocably changes what if anything that would be returned to the public.

at the application of the business judgment rule, that require that a court *meaningfully* participate in the determination of whether a transfer of property is for an appropriate public purpose.[5]

Second, the Group's mantra of legislative deference based on the idea that the City Council and legislature have spoken reflects a naïve view of local politics, which explains why it has always been soundly rejected. By arguing that the legislature has already spoken, the Group advances a standard of no review, and thereby foreordains that all transfers will pass constitutional muster. That is not the state of the law, which mandates heightened scrutiny and the ignoring of hollow pronouncements of economic development and other benefits as were rejected in *Scott* and *Lucas*. Indeed, *Lucas* is consistent with the position of the Plaintiffs here, and if properly applied, leads to the conclusion that the proposed OPC is violative of the public trust doctrine. In making its determination, the *Lucas* court recognized that courts must be skeptical with regards to claims of public benefit, otherwise the "legislature would have unfettered discretion," which is applicable here.

Moreover, the situation involving OPC involves insider favoritism where the parties entering into the deal are those with close alliances to those in public office, and are appropriately subject to heightened scrutiny as if it were a private transaction where a director or trustee has raised the business judgment rule but questions of conflicts, favoritism, and inadequate preparation are at issue. These are precisely the type of issues that public trust law is concerned with.

Further, it cannot be ignored that the public trust property at issue here has a designated and recognized use – a unique and national historic Olmsted landscape. No public trust decision has approved the utter destruction of an existing landmark landscape to further a private (or for even that matter a public) interest. Even the Group recognizes that a goal of the public trust

[5] *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) recognizes that courts must have some role in reviewing legislative action as "[i]t is emphatically the province and duty of the judicial department to say what the law is."

doctrine is to avoid "momentous and ecologically irreversible governmental action." That is precisely what is at issue here with OPC.

Conclusion: The application to build the OPC in Jackson Park is contrary to the public trust doctrine, and the Defendants' motion to dismiss must be denied.

Dated: January 15, 2018

Respectfully submitted,

PROFESSOR RICHARD EPSTEIN

Attorney for *amicus curiae*

APPENDIX

Short Biographical Statement

Richard A. Epstein is the Laurence A. Tisch Professor of Law, at New York University, the Peter and Kirstin Senior Fellow at the Hoover Institution, and the James Parker Hall Distinguished Service Professor Emeritus and Senior Lecturer, the University of Chicago. He has written and taught extensively on property and constitutional issues, including those pertaining to the public trust doctrine. His books include *The Classical Liberal Constitution: The Uncertain Quest for Limited Government* (2014), and *Takings: Private Property and the Power of Eminent Doman (*1985). He is a member of the American Academy of Arts and Sciences (1985), a recipient of the Bradley Prize (2011), and honorary degrees from the University of Ghent (2003), and the University of Siegen (2018).